No. 10,501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY DICKINSON (his wife), WILLIAM KEMP, and L. K. FEREVA, individually and doing business under the firm name and style of "Fereva Chevrolet Company",

Appellants,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD.,

Appellee.

PETITION OF APPELLEE FOR A REHEARING AND FOR CLARIFICATION OR MODIFICATION OF OPINION RENDERED HEREIN.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, General Accident Fire and Life Assurance Corporation, Ltd., appellee herein, respectfully petitions this Honorable Court for a rehearing and that this Honorable Court give and make its order

clarifying or modifying the opinion rendered herein on the 1st day of February, 1945, by adding thereto a statement that the decision of this Honorable Court is without prejudice to the right of appellee to move for a new trial after the entry of judgment, or to add a suitable statement to that effect.

Your petitioner respectfully states that as the decision now reads it is ambiguous, and leaves entirely open the question as to whether or not it strips appellee of the right to move for a new trial, which right is recognized by Rule 59 of the Rules of Civil Procedure for the District Courts of the United States, and by the California Code of Civil Procedure, Section 659. Under both the rules of court and the California statute the time for serving motion for new trial is ordinarily not later than 10 days after the entry of judgment, and petitioner assumes that it is not the intention of this Honorable Court to take this right away.

The trial court in this instance treated the action as one in equity, and the verdict of the jury as an advisory one. An advisory verdict is of course not binding upon the trial judge, and it may be disregarded and findings of fact and conclusions of law substituted in lieu thereof.

Idaho & Oregon Land Improvement Co. v. Bradbury, 132 U. S. 509, 33 L. Ed. 433;
Kohn v. McNulta, 147 U. S. 238, 37 L. Ed. 150.

This court by its decision holds that this procedure was improper and that the verdict was not an advisory one but a verdict at law.

Considering it in the light of the decision of this honorable court we respectfully submit that the appellee is entitled to have the verdict and judgment reviewed by the trial court on motion for new trial, and this is especially true in this particular case because the trial court has expressly found that testimony given upon the trial was false and untrue. The rule applicable is well stated by Circuit Judge Parker in

Aetna Casualty & Surety Co. v. Yeatts (4th Cir.), 122 Fed. (2d) 350, 354:

"The distinction between the rules to be followed in granting a new trial and directing a verdict were stated by us with some care in Garrison v. United States, 4 Cir., 62 F. (2d) 41, 42, from which we quoted with approval in the later case of Roedegir v. Phillips, 4 Cir., 85 F. (2d) 995, 996, as follows: 'Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice. See Felton v. Spiro (6 Cir.), 78 F. 576. Verdict can be directed only where there is no substantial

evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is. Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720. Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice'."

As is stated by the Honorable Supreme Court in *Smith v. Royer,* 181 Cal. 165, 171-2, 183 Pac. 660:

"In a jury trial a party is entitled to two decisions on the evidence—one by the jury and one by the trial court, and the trial court is not bound by a conflict in the evidence. (Dickey v. Davis, 39 Cal. 565; Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Condee v. Gyger, 126 Cal. 546, 59 Pac. 26; Green v. Soule, 145 Cal. 96, 78 Pac. 337.)"

And the same rule is thus stated in *Green v. Soule,* 145 Cal. 96, 102, 78 Pac. 337, as follows:

"This evidence, though not very satisfactory, is sufficient to raise a conflict which cannot be decided by this court. If the court below was satisfied that the witnesses for defendant were entitled to equal credit with Cleary, it might well have ordered a new trial. But this court cannot pass upon the credibility of witnesses, and hence cannot interfere upon this ground. We frequently have cause to believe that the judges of the Superior

Court are too reluctant to exercise their power of granting a new trial for insufficiency of the evidence, and too much inclined to acquiesce in a verdict of the jury which does not meet with their own approval. There is a clear and obvious distinction between the duty of a trial court and the duty of an appellate court with respect to the decision of such questions, and it is well established by the decisions of this court. The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. 'Where the decision is against the weight of the evidence, it is the duty of that court to grant a new trial.' (Irving v. Cunningham, 58 Cal. 309; Mason v. Austin, 46 Cal. 387; Hawkins v. Abbott, 40 Cal. 639; Bjorman v. Fort Bragg Co., 92 Cal. 500.) 'If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. He has had the same opportunity as the jury to observe the manner of the witnesses, and to decide upon their credibility, and it is his duty to see that the verdict is not clearly against the weight of the evidence. He must exercise a wholesome and discreet supervision over the jury in this respect.' (Dickey v. Davis, 39 Cal. 569.) 'There, although there may be what to us, judging from the cold record, seems a substantial conflict in the evidence, the court having heard the evidence, and having had ample opportunity to judge as to the demeanor, manner, and credibility of the witnesses, may, if he is dissatisfied with the verdict, and is of the opinion that it is clearly against

the weight of the evidence, set it aside and grant a new trial. The judge of the superior court is in a position to determine between the apparent and the real, to detect the fallacy of specious testimony which may have misled the jury, but which his wider experience enables him to readily comprehend.' (Bates v. Howard, 105 Cal. 178.) Of course, the judge should give due respect to the verdict of the jury, and may sometimes properly deny a new trial in cases where if submitted to him without a jury he might upon the evidence have made a different decision. He must be clearly satisfied that the verdict is wrong, otherwise he should let it stand. But in considering the question upon the motion he must act upon his own judgment as to the effect of the evidence. The parties are entitled to the judgment of the jury in rendering a verdict, in the first instance; but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence."

To the same effect may be cited a large number of California decisions of which we think it sufficient to refer this honorable court to the following:

Hirside v. Cochran, 109 Cal. App. 377, 293 Pac. 165;

Beall v. Erickson, 113 Cal. App. 36;

Lewis v. Southern California Edison Co., 116 Cal. App. 44, 2 Pac. (2d) 419;

Anderson v. Dahl, 121 Cal. App. 198, 8 Pac. (2d) 883;

Sisley v. Cole, 135 Cal. App. 4, 26 Pac. (2d) 528;

Chapman v. Goldberg, 140 Cal. App. 644, 35 Pac. (2d) 641;

Ohlson v. Frazier, 2 Cal. App. (2d) 708, 39 Pac. (2d) 429;

Francis v. Pacific Electric Ry. Co., 9 Cal. App. (2d) 278, 49 Pac. (2d) 313.

CALIFORNIA LAW CONTROLS IN THIS MATTER.

We submit that the law of the State of California controls in this matter since the decision in

Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487;

Simkins Federal Practice, Section 1134, p. 821 ffg.

A state law consists of judicial decisions as well as statutes.

West v. American Tel. & Tel. Co., 311 U. S. 223, 85 L. Ed. 139, 132 A. L. R. 956.

The same rule must now be applied in state and federal courts.

Fidelity Union Trust Co. v. Field, 311 U. S. 169, 85 L. Ed. 109.

APPELLEE'S OBJECTIONS AND EXCEPTIONS AT THE TRIAL NOT YET PRESENTED.

In addition this petitioner respectfully urges that the record on appeal herein was prepared by the appellants with a view to presenting the points to which appellants took exception. There remain many questions as to the admissibility of evidence, conduct of the trial and instructions to the jury, which do not come within the scope of the printed record, and are nevertheless matters properly to be considered by the trial court when called upon to pass upon a motion for a new trial.

That confusion may be obviated and no erroneous impression be conveyed to the trial judge in this matter we respectfully and sincerely urge that a rehearing should be granted herein, and that the decision of this honorable court be clarified or modified.

Dated, San Francisco,
February 16, 1945.

Respectfully submitted,
MYRICK & DEERING AND SCOTT,
JAMES WALTER SCOTT,
Attorneys for Appellee and Petitioner.

Certificate of Counsel.

I, James Walter Scott, attorney and counsellor for appellee, do hereby certify that in my judgment the foregoing petition for rehearing is well founded and the same is not interposed for delay.

Dated, San Francisco,
February 16, 1945.

James Walter Scott,
Of Counsel for Appellee and Petitioner.